STATE OF MICHIGAN

COURT OF APPEALS

JODI TALLARIGO,

Plaintiff-Appellee/Cross-Appellant,

v

DANIEL GRANGER,

Defendant-Appellant/Cross-Appellee,

and

LAURIE ROSS GRANGER and RICHARD GRANGER,

Defendants/Cross-Appellees.

UNPUBLISHED
September 9, 2003

No. 237469
Wayne Circuit Court
LC No. 99-916457-NH

Before: Judge Zahra, P.J., and Talbot and Owens, J.J.

PER CURIAM.

In this premises liability case, defendant Daniel Granger appeals as of right the trial court's order of judgment following a jury trial, and plaintiff cross-appeals. This case is submitted on appeal together with *Allstate Insurance Co v Daniel Granger*, (Docket No. 236753), a declaratory judgment case. The dispositive issue on appeal is whether all defendants were entitled to summary disposition on the ground that they did not owe plaintiff, a child social guest, a heightened duty of care to protect her from the criminal acts of another social guest. We conclude that defendants did not owe plaintiff a heightened duty of care. We vacate the stipulated order of judgment entered by the trial court relating to plaintiff's claims of negligence and we reverse the trial court's order denying summary disposition.

I. Facts and Procedural History

According to the evidence submitted to the trial court on summary disposition, plaintiff, who was fourteen years of age, accompanied her friend Nicole Ciccarelli and two young men who were senior students from her high school, Robbie Cooper and Jimmy Raymond, to the home of eighteen-year-old Granger, another senior student. Granger's step-mother and father, defendants Laurie Ross Granger and Richard Granger, were away on vacation. The visitors

consumed alcohol and plaintiff became intoxicated. Plaintiff twice voluntarily performed fellatio on Cooper and alleged that Granger forced her to perform fellatio on him.

Plaintiff brought suit against Granger and his parents claiming that they owed her, a social guest, a duty to protect her against the criminal sexual conduct of their social guest, Cooper.[1] Plaintiff also alleged a claim of assault and battery against Granger for forcing her to perform fellatio. Granger and his parents filed motions for summary disposition in response to the several amended complaints filed in this case. The motions related to the negligence claims were denied.

At the conclusion of the eight-day trial, the jury found no cause of action with respect to the assault and battery claim against Granger.[2] With respect to the negligence claim, the jury found that Granger and his parents were negligent but that only Granger's negligence was a proximate cause of plaintiff's injuries. The jury found that plaintiff was comparatively negligent for twenty-three percent of the injury. The jury awarded plaintiff $40,000 in past non-economic damages, $125,000 in future non-economic damages, and $225,000 in future medical expenses.

II. Granger's Appeal

Granger argues that the trial court improperly denied his motion for partial summary disposition. He brought his motion for partial summary disposition under MCR 2.116(C)(10), seeking dismissal of the negligence claim. "This Court reviews the grant or denial of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law." *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). This Court's review is limited to the evidence presented to the trial court at the time the motion was decided and the reviewing court "should evaluate a motion for summary disposition under MCR 2.116(C)(10) by considering the substantively admissible evidence actually proffered in opposition to the motion." *Id.* at 121; *Sprague v Farmers Ins Exch*, 251 Mich App 260, 265; 650 NW2d 374 (2002). If the evidence fails to establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10). Questions of law are reviewed de novo. *Cardinal Mooney High School v Michigan High School Athletic Ass'n*, 437 Mich 75, 80; 467 NW2d 21 (1991).

Duty is an obligation to conform to a specific standard of care toward another as recognized under the law. *Smith v Stolberg*, 231 Mich App 256, 258; 586 NW2d 103 (1998). Whether a duty exists is a question of law "solely for the court to decide." *Murdock v Higgins*, 454 Mich 46, 53; 559 NW2d 639 (1997).

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[1] The lawsuit was filed by plaintiff's mother Teina Tallarigo, as her next friend. The trial court subsequently entered an order allowing the parties to change the caption of the case when plaintiff reached the age of majority.

[2] The assault and battery claim is not part of this appeal.

A. Plaintiff's Legal Status on the Premises

Granger argues that he had no duty to warn or protect plaintiff from her sexual activity with Cooper, an eighteen-year old adult. In essence, this Court is required to determine whether this case is governed by the "heightened duty of care" that a landowner owes a child social guest as provided in the decision in *Klimek v Drzewiecki*, 135 Mich App 115; 352 NW2d 361 (1984), as the trial court in this case ruled, or by the requirement that a social host refrain from wilful and wanton misconduct toward his social guests as provided in the recent decision in *Taylor v Laban*, 241 Mich App 449; 616 NW2d 229 (2000).

To establish a prima facie case of negligence, a plaintiff must prove that (1) the defendant owed a duty to her, (2) the defendant breached that duty, (3) the defendant's breach of duty was a proximate cause of her damages, and (4) the plaintiff suffered damages. *Krass v Tri-County Security, Inc*, 233 Mich App 661, 667-668; 593 NW2d 578 (1999). "A negligence action may only be maintained if a legal duty exists which requires the defendant to conform to a particular standard of conduct in order to protect others against unreasonable risks of harm" and it is the trial court which determines the circumstances "that must exist in order for a defendant's duty to arise." *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 95-96; 485 NW2d 676 (1992) (citation omitted).

In premises liability cases, the duty owed by the landowner is determined by the plaintiff's status at the time of injury. *Burnett v Bruner*, 247 Mich App 365, 368; 636 NW2d 773 (2001). Our Supreme Court recently affirmed that, when determining the duty a landowner owes a visitor injured on the premises, Michigan adheres to the common-law categories for persons who enter upon the land or premises of another, as (1) trespasser, (2) licensee, or (3) invitee. *Stitt v Holand Abundant Life Fellowship*, 462 Mich 591, 596; 614 NW2d 88 (2000). In this case, it is not disputed that plaintiff was a social guest. Social guests are generally "licensees" to whom a landowner owes a duty "only to warn the licensee of any hidden dangers the owner knows or has reason to know of, if the licensee does not know or have reason to know of the dangers involved." *Id*. Accordingly, the landowner need not make the premises safe for the licensee's visit. *Id*.

However, the issue before the trial court was whether Michigan law, as interpreted by this Court in *Klimek*, would place plaintiff in the higher category akin to that of an "invitee" because of her minority. An "invitee" is a person who enters for business purposes upon the premises that is held open for a commercial purpose. *Id*. at 596-597, 604. An invitee requires the highest level of protection under premises liability law and a landowner must warn the invitee of any known dangers, in addition to making the premises safe by inspecting the premises and making necessary repairs or warn the invitee of any discovered hazards. *Id*. at 597.

In *Klimek*, this Court held that a loose, unsupervised and dangerous dog in close proximity to the defendant's unfenced property was a "condition on the land." *Id*. at 119. Relying on legal treatises that described trends adopted by sister jurisdictions, this Court recognized that a higher degree of reasonable or ordinary care should be afforded to the child social guest. *Id*. at 119-120.

We believe that the decision in *Klimek* may be legally unsound. Our Supreme Court has recently affirmed that Michigan has not abandoned the three common-law categories for persons

who enter upon the land or premises of another. *Stitt, supra* at 596. "Where landowners' liability is still determined by categorizing entrants upon the land as trespassers, licensees, and invitees, children as well as adults are subject to the classification scheme" and "[the children's] rights are determined by the classification in the same way as adults' right." Dobbs, The Law of Torts (2001), Ch 13 §§ 236, p 608. Thus, *Klimek*'s provision of a heightened duty of care runs afoul with the common law grounds upon which persons on the land of another are categorized. See also, *Siver v Campbell*, unpublished opinion per curiam of the Court of Appeals, issued March 30, 2001 (Docket No. 218287), in which this Court questioned the legal soundness of the decision in *Klimek*.

However, a determination with respect to the legal soundness of *Klimek* is unnecessary in this case because *Klimek* is also factually distinguishable and, as defendant points out on appeal, the decision in *Klimek* has no precedential effect on this Court pursuant to MCR 7.215(I)(1). *Klimek* involved a defect or condition of the land of which the homeowner was aware. It did not involve the duty of a landowner to protect a child social guest from the criminal acts of a third person. Plaintiff does not allege that the conduct of Cooper, as a social guest, was a "condition of the land." Instead, she alleges that Granger failed to adequately supervise, control and regulate the activities of Cooper, another social guest on the premises. Therefore, *Klimek* is inapplicable. In light of the decision in *Stitt*, we conclude that plaintiff, a social guest, was a licensee on the premises and was not entitled to a duty of care akin to that afforded to an invitee.

B. The Duty of a Landowner to Control His Social Guests

This Court's recent decision in *Taylor* squarely addresses the issue of the duty of a landowner to his social guests. This Court adopted the view from sister jurisdictions that a social host is under no duty to make the premises safe for a social guest other than to warn the guest of concealed defects on the land that are known to the owner, and to refrain from wilful and wanton misconduct that injured the guest. "[A] social host has a duty to control guests, but only to the extent that the host refrain from wilful and wanton misconduct that results in one guest injuring another guest." *Taylor, supra* at 457. The required elements for wilful and wanton misconduct are:

> (1) knowledge of a situation requiring the exercise of ordinary care and diligence to avert injury to another, (2) ability to avoid the resulting harm by ordinary care and diligence in the use of the means at hand, and (3) the omission to use such care and diligence to avert the threatened danger, when to the ordinary mind it must be apparent that the result is likely to prove disastrous to another. [*Taylor, supra*, quoting *Miller v Inglis*, 223 Mich App 159, 166; 567 NW2d 253 (1997).]

Viewing the facts in a light most favorable to plaintiff, we conclude that Granger's conduct would meet the three required elements for "wilful and wanton misconduct." However, Granger's misconduct was more than merely wilful and wanton; the facts show that he actively created and maintained the criminal activity. A landowner does have a duty to protect all people using his land if he actively creates or maintains criminal activity or fails to act reasonably to end criminal activity that takes place in his presence. *Taylor, supra*, at 456; *Gouch v Grang Trunk W R Co*, 187 Mich App 413, 416-417; 468 NW2d 68 (1991). Here, plaintiff argued below that Granger's house was used as an "instrumentality" for the rape of a minor and plaintiff's complaint expressly alleges that Granger allowed Cooper to enter his home "for the express

purpose of raping and/or having sex with under age girls" including plaintiff. It is undisputed that sexual conduct with a minor is a crime. The facts establish that Granger knew that Cooper was engaging in sex with plaintiff and that Granger maintained the criminal activity by his own participation in a sexual act with plaintiff. Thus, Granger's conduct establishes an intentional act.

Although plaintiff may have had valid legal claims against Granger, plaintiff could not collect an award of damages from the insurance policy for Granger's intentional acts. Plaintiff's counsel expressly stated on the record in the companion declaratory judgment case of *Allstate Insurance Co v Granger*, (Docket No. 236753), that the Grangers' insurance policy did not cover intentional acts. Because plaintiff failed to properly plead a claim against Granger under the decision in *Taylor*, plaintiff's negligence claim was defective and failed as a matter of law. Accordingly, the trial court erred in denying Granger summary disposition on the negligence claim. This issue is dispositive to Granger's remaining arguments on appeal, and we decline to address them.

II. Cross-Appeal

Granger's issue on appeal is also dispositive to the issues raised on cross-appeal and we decline to address them. Further, cross-appellees Laurie Ross Granger and Richard Granger argue that the same analysis and conclusion with respect to Daniel Granger's issue on appeal applies to their defense on cross-appeal. From our review of the record, we conclude that plaintiff was similarly required to allege wilful or wanton misconduct or show a special relationship that created a duty on the part of Laurie Granger and Richard Granger to protect her from Cooper's conduct. Having failed to do either, plaintiff's claim against them also fails as a matter of law. Therefore, the trial court erred in denying Laurie and Richard Granger summary disposition. Accordingly, we vacate in part the stipulated order of judgment entered by the trial court relating to plaintiff's claims of negligence against Granger and his parents, and reverse the court's orders entered on the motion for summary disposition that was filed jointly by the three defendants on December 26, 2000.

The order of judgment is vacated in part and the orders denying summary disposition on the negligence claims are reversed.

/s/ Brian K. Zahra
/s/ Michael J. Talbot
/s/ Donald S. Owens